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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GOLDEN EAGLE INSURANCE CORPORATION, Plaintiff and Respondent, v. GERLING AMERICA INSURANCE COMPANY, Defendant and Appellant.	B206917 (Los Angeles County Super. Ct. No. BC267303)

APPEAL from orders and a judgment of the Superior Court of Los Angeles County. Michael C. Solner and Victor Person, Judges. Reversed.

Chamberlin Keaster & Brockman and Robert Keaster for Defendant and Appellant.

Lindahl Beck and Kelley K. Beck for Plaintiff and Respondent.

Defendant and appellant Gerling America Insurance Company (Gerling) appeals from certain trial court orders and a judgment in favor of plaintiff and respondent Golden Eagle Insurance Corporation (Golden Eagle). In particular, Gerling challenges the trial court's April 6, 2006, order denying its motion for summary judgment and granting Golden Eagle's motion for summary adjudication. According to Gerling, the trial court misinterpreted the relevant exclusion set forth in an endorsement to its insurance policy.

We agree. The exclusion at issue plainly precludes coverage for the damages sought. Accordingly, Gerling was entitled to summary judgment. It follows that the trial court's order granting Golden Eagle's motion for summary adjudication is reversed, as well as the judgment entered against Gerling.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Insurance Policies

A. *The Golden Eagle Policy*

Golden Eagle issued commercial general liability policy No. CCP405535-00, effective June 27, 1996, to June 27, 1997 (the Golden Eagle policy) to Cal-State Steel Corporation (Cal-State). Golden Eagle charged a premium of $238,235 for the Golden Eagle policy. The Golden Eagle policy provided coverage for claims of "property damage" caused by an "occur[ence] during the policy period." The Golden Eagle policy also provided coverage for "property damage" only if the "property damage" occurred during the policy period.

B. *The Gerling Policy*

Gerling issued commercial general liability policy No. 8020828 GLP to Cal-State, effective June 27, 1997, to June 27, 1998 (the Gerling policy). Gerling charged a premium of $152,841 to Cal-State.

The Gerling policy contains an exclusion in an endorsement titled "PRIOR DAMAGES EXCLUSION" (the PDE), which provides, in relevant part: "This insurance shall not apply to: 'property damage'. . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception of the policy period . . . , whether visible or invisible, detected or undetected, known or unknown, to

any Insured before such inception date . . . . This exclusion shall be applicable to all damage(s), defect(s), deficiency(ies), inadequacy(ies) or dangerous condition(s) including, but not limited to, damage, defect, deficiency, inadequacy, or dangerous condition. . . . '[P]roperty damage'. . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition shall be deemed to have existed as of the earliest date by which any damage occurred, irrespective of whether the Insured was aware of the existence of any such damage, and irrespective of whether such damage may have been continuous or progressive or may have been due to repeated exposure to substantially the same harmful conditions or may have become progressively worse during the period of this Policy. . . . We have no obligation to investigate or defend any liability, claim or suit to which this insurance does not apply."

II. The Underlying Action

A. *The Rio Vista Project and Cal-State's Work*

Cal-State is a subcontractor that installed structural steel and miscellaneous metal, including steel stairs and wrought iron railings, at the Rio Vista Project in 1996. Cal-State finished its work on the project in 1996. The entire Rio Vista Project was completed in December 1996.

B. *Cal-State's Alleged Defective Work in the Underlying Action*

The plaintiff in the underlying action, *Rio Vista Village Limited Partnership v. Leidenfrost/Horowitz & Associates, Inc., et al.*, Los Angeles Superior Court Case No. BC203124 (the underlying action) contended that a number of subcontractors, including Cal-State, provided defective workmanship at the Rio Vista Project. The plaintiff alleged that as a result of such defects, there was water intrusion for which the plaintiff was seeking damages.

In particular, the plaintiff alleged that "the handrails were not installed with the proper steel sleeve and they were not incorporated into a proper waterproofing system." As a result, "beginning with the El Nino storms of 1997-1998, the Rio Vista project suffered significant water damage due to faulty design and/or construction, including, but not limited to, damage relating to the Project's plaza level deck, as well as damage

relating to the elevated walkways that traverse the Project. The project suffers from numerous other construction defects as well."

The first amended complaint further alleged that "[d]uring each successive rainy season, the damage to the Project has continued and intensified, and plaintiff estimates the cost of repair, along with associated lost projects and relocation costs, at in excess of $10,000,000.00." It continues: "Cal-State . . . negligently and wrongfully failed to exercise reasonable care in the performance of its work as evidenced by the fact that, among other things, the elevated walkways suffer from water intrusion, leading to extreme property damage, and leaving the Project unfit for its intended use."

C. *Tender of Defense*

On November 9, 2000, counsel for Cal-State, tendered the defense of Cal-State to Gerling. Following its review of certain requested documentation, on February 28, 2001, Gerling, through its coverage counsel, declined coverage based on the PDE as "all of the alleged defects have existed since the original installation of the insured's work." Gerling noted that all of the documentation indicated that Cal-State's work on the project was completed prior to the inception of its policy.

Meanwhile, Golden Eagle accepted the defense under a full reservation of rights including, among other things, damages outside its policy period. Ultimately, its reinsurer, San Diego Insurance Company (SDIC), ended up funding $206,096.80 in defense costs.

D. *Settlement in the Underlying Action*

In February 2002, SDIC paid to settle the underlying action on behalf of Cal-State for Golden Eagle's policy limits of $1 million.

III. The Instant Litigation

A. *Golden Eagle Initiates This Action*

On January 30, 2002, Golden Eagle filed the instant complaint against Gerling for (1) equitable subrogation; (2) subrogation; (3) equitable contribution; and (4) equitable indemnity. It sought damages for amounts SDIC paid to defend and indemnify Cal-State in connection with the underlying action.

On April 30, 2002, Golden Eagle dismissed its first cause of action for equitable subrogation. Its equitable contribution claim was pled in the alternative to its claim for subrogation.

B. *The Original Motions for Summary Judgment/Adjudication*

On March 24, 2004, Golden Eagle and Gerling filed cross-motions for summary judgment or, in the alternative, summary adjudication of issues.

The trial court (Hon. Richard C. Hubbell) denied Golden Eagle's motion, finding that Golden Eagle had failed to prove the existence of a potential for coverage under the Gerling policy and that Gerling demonstrated the absence of any such potential. It based its ruling upon the PDE in the Gerling policy: "The Court finds that there is no ambiguity in the [PDE] in [the Gerling policy]. As it is written in the disjunctive, it applies to 'bodily injury' or 'property damage' 'arising out of any . . . , defect . . . which existed prior to the inception of the policy . . . .' As the alleged defect in the underlying action ([i.e.,] Cal-State's work) existed prior to the inception of [the Gerling] policy, the 'bodily injury' or 'property damage' arising from that defect is excluded from coverage pursuant to the plain language of the [PDE]."

Despite this interpretation, the trial court also denied Gerling's motion for summary judgment, after it sustained Golden Eagle's evidentiary objections to the declaration of Gerling's counsel, who attempted to personally authenticate the Gerling policy.

C. *The Second Round of Motions for Summary Judgment/Adjudication*

In an attempt to remedy the authentication problem of its original motion for summary judgment, in September 2004, Gerling filed a second motion for summary judgment. Attached to its motion was a declaration from a Gerling employee who could authenticate the Gerling policy.

In October 2004, Golden Eagle refiled its motion for summary judgment or, in the alternative, adjudication regarding: (1) Gerling's duty to defend, (2) Gerling's duty to indemnify, (3) Golden Eagle's third cause of action for equitable contribution, and (4) Gerling's third affirmative defense regarding its PDE. Its motion was based upon the

same law as set forth in its original motion for summary judgment. Its purported new evidence consisted of a declaration from Cal-State's defense counsel, Ronald H. Mandel (Mandel), in the underlying action, in which he averred that Cal-State did nothing wrong. No explanation was provided as to why Mandel's declaration was not submitted in connection with Golden Eagle's original motion for summary judgment. Later, Golden Eagle submitted deposition testimony from Gerling's person most knowledgeable regarding other claims.

D. *The Action is Reassigned*

Before the second set of motions for summary judgment could be heard, the action was reassigned to the Honorable Victor H. Person.

E. *Judge Person Grants Golden Eagle's Motion for Summary Adjudication and Denies Gerling's Motion for Summary Judgment*

On April 6, 2006, Judge Person granted Golden Eagle's motion for summary adjudication and denied Gerling's motion for summary judgment, finding that, contrary to what Judge Hubbell had determined, the PDE did not preclude coverage. Judge Person also found that Gerling owed a duty to defend and indemnify Cal-State in connection with the underlying action.

Regarding the PDE, Judge Person found that it was ambiguous and that it only applied to property damage that first began before the effective date of the Gerling policy.

F. *Trial*

Following the trial court's denial of Gerling's motion for reconsideration , the case was reassigned to Judge Michael C. Solner, who presided over a bench trial. After the parties presented their evidence and argument, on November 19, 2007, the trial court issued its statement of decision, finding that Golden Eagle was entitled to judgment in the amount of 50 percent of the sums paid for the defense and settlement of the underlying action, plus prejudgment interest at the simple rate of 7 percent.

Furthermore, the trial court agreed with Judge Person's prior determination that Gerling's PDE operated as a prior damages exclusion, not a prior work exclusion.[1] In other words, the Gerling policy did not exclude coverage where the defect, but not the property damage, preceded the policy period. In so finding, the trial court acknowledged that the PDE contains language that purports to exclude coverage for "property damage" that arises "out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception of the policy period"; however, the trial court determined that "if this phrase were interpreted in context to mean damages incepting within the Gerling policy are not covered if the defect—inadequately secured railings—existed before its policy incepted, that would make not only the $1 million represented limit for 'Products-Completed Operations' illusory . . . , but would render language in the second paragraph meaningless surplusage."

G. *Judgment and Appeal*

On January 25, 2008, the trial court overruled Gerling's objections. Judgment was awarded against Gerling and in favor of Golden Eagle on each equitable cause of action in the complaint in the amount of $851,367.78, together with costs and interest at the rate of $116.70 per day from November 29, 2007.

Gerling's timely appeal from the judgment and Judge Person's April 6, 2006, order granting Golden Eagle's motion for summary adjudication and denying Gerling's motion for summary judgment ensued.

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[1] As for Judge Person's ruling on Golden Eagle's second motion for summary adjudication, the trial court found that he had jurisdiction to rule on the motion and, even if he did not, because this trial court agreed with Judge Person's construction of the Gerling policy, the issue was moot.

DISCUSSION

I. *Trial Court's April 6, 2006, Order Granting Golden Eagle's Motion for Summary Adjudication and Denying Gerling's Motion for Summary Judgment*

A. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

B. Law Governing Interpretation of Insurance Contracts

Interpretation of an insurance policy is also a question of law. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) In general, an insurance policy is interpreted in the same manner as any other contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; see also *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) An insurance policy should be interpreted so as to give effect to the mutual intention of the parties. (Civ. Code, § 1636; *Waller v. Truck Ins. Exchange, Inc.*, *supra*, at p. 18.) This intention should be inferred, if possible, solely from the language of the policy. (Civ. Code, § 1639; *Waller v. Truck Ins. Exchange*, *supra*, at p. 18.) A court looks first to the language of the policy in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) "[W]ords in an insurance policy must be read in their ordinary sense, and any ambiguity cannot be based on a strained interpretation of the policy language." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912.)

In interpreting a policy, "[i]f contractual language is clear and explicit, it governs. (Civ. Code, § 1638.)" (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1264.) The need to consider other principles of interpretation arises only if the language of an insurance policy is ambiguous.

"Although insuring clauses normally are interpreted broadly [citation] and exclusions are strictly construed [citation], 'where an exclusion is clear and

unambiguous, it is given its literal effect.' (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶ 4:54.10, p. 4-22.) And, while exceptions to exclusions are 'somewhat analogous to coverage provisions' and thus are interpreted broadly [citation], they are still subject to the same rules of policy interpretation, i.e., we first look 'to the language of the contract in order to ascertain its plain meaning.' [Citation.]" (*Westoil Terminals Co., Inc. v. Industrial Indemnity Co.* (2003) 110 Cal.App.4th 139, 146.)

C. The Trial Court Erred in Denying Gerling's Motion for Summary Judgment

The PDE provides, in relevant part: "This insurance shall not apply to: [¶] 'property damage' . . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition which existed prior to the inception of the policy period." Under the circumstances presented, there was no potential for coverage in the underlying action. The alleged defect, deficiency, or inadequacy in Cal-State's work that caused the damage necessarily existed by the time the work on the Rio Vista Project was completed in 1996, prior to the inception of the Gerling policy.[2] As the allegedly defective construction at issue in the underlying action existed prior to the inception of the Gerling policy, the alleged property damage arising from that defect is excluded from coverage pursuant to the PDE.

In defending the judgment, Golden Eagle relies upon a subsequent paragraph (the deemer provision) in the PDE, which provides, in relevant part, that "'property damage' . . . arising out of any damage, defect, deficiency, inadequacy or dangerous condition

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[2] It follows that we are not convinced by Golden Eagle's theory that Cal-State's work was not negligent until the subject railings were subjected to normal use by Rio Vista Project occupants. A reasonable person would have expected the railings to work properly upon installation. The fact that they may not have functioned as expected (because they allegedly failed after subjected to normal use) indicates that they were defective or deficient upon completion of Cal-State's work.

shall be deemed to have existed as of the earliest date by which any damage occurred." According to Golden Eagle, there must be prior damage in order for the PDE to apply.

Golden Eagle's reading of the PDE is strained. (*General Reinsurance Corp. v. St. Jude Hospital* (2003) 107 Cal.App.4th 1097, 1108.) All this sentence does is clarify that *all* property damage is deemed to exist on the date that *any* damage first occurs. It does not dictate that *both* (1) damage, *and* (2) a defect, deficiency, inadequacy, or dangerous condition exist prior to the policy's inception before the PDE is triggered.

For this reason, Golden Eagle's focus on when "significant damage" to the Rio Vista Project occurred is irrelevant. The PDE is written in the disjunctive—there is no coverage for any property damage arising out of "any damage, defect, deficiency, inadequacy *or* dangerous condition." (Italics added.) The plain meaning of the word "or" is that only one condition is required. (*Houge v. Ford* (1955) 44 Cal.2d 706, 712.) As explained above, because the alleged defect or deficiency or inadequacy in Cal-State's work necessarily occurred before the inception of the Gerling policy, the PDE excludes coverage.

Golden Eagle also argues that adopting Gerling's interpretation renders this second paragraph "meaningless surplusage." We are not convinced. The deemer provision is not "meaningless" because it limits the scope of the PDE; as set forth above, it makes clear that all "property damage" is deemed to exist as of the earliest date that any damage exists.

Golden Eagle similarly asserts that the title of the PDE—"PRIOR DAMAGES EXCLUSION"—is controlling; there must be prior damage, not just a prior defect, in order for the PDE to apply. While relevant, titles and section headings do not control the terms of a contract. (See, e.g., *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 263 [the gravamen of a claim is controlling, not the title used in the complaint]; *City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1340 [titles and section headings do not control the provisions of a statute; nor can they be used to create ambiguity when construing a statute].)

To the extent Golden Eagle suggests that the PDE is hidden or inconspicuous, its position is not well-taken. Unlike the exclusions mentioned in the cases cited in Golden Eagle's appellate brief (see, e.g., *Cal-Farm Ins. Co. v. TAC Exterminators, Inc.* (1985) 172 Cal.App.3d 564, 577; *Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1549; *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 722–723), the PDE is not buried in fine print (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 273); rather, it is separately labeled and, in all capital letters, indicates that it is an exclusion that changes the terms of the policy. (See, e.g., *Feurzeig v. Insurance Co. of the West* (1997) 59 Cal.App.4th 1276, 1283; *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645, 652.)

Like the trial court found, Golden Eagle further argues that Gerling's interpretation of the PDE renders the Gerling policy illusory. "If the endorsement was interpreted to mean damages incepting within the Gerling policy are not covered if the defect—in this case inadequately secured railings—existed before its policy incepted, that would make the $1 million represented limit for 'Products-Completed Operations' illusory . . . and create a huge unexpected gap in coverage." There are several problems with this argument. First, Golden Eagle does not discuss whether it has standing to object to a provision in the Gerling policy as illusory. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 165 [an appellant's failure to properly present legal argument deems a contention to be forfeited].) Second, even if we were to agree that the PDE rendered the "Products-Completed Operations" provision of the Gerling policy illusory (which, as set forth below, we do not), that conclusion would not render the entire Gerling policy illusory. (*Martin v. World Savings & Loan Assn.* (2001) 92 Cal.App.4th 803, 809.) After all, the Gerling policy is a commercial general liability policy, which provides for a host of coverage. It is not simply a products completed operations policy. Third, there is no unexpected gap in insurance coverage; the Golden Eagle policy covered the sort of claim that gave rise to the instant litigation.

In any event, as counsel clarified during oral argument, the PDE is not illusory. Rather, tracking the plain language of the Gerling policy and the PDE, coverage is just

very slim, requiring that both the work be completed and the first damage occur during the policy period. "'[A]n insurance company can limit the coverage of a policy issued by it as long as such limitation conforms to the law and is not contrary to public policy.' [Citation.] 'An insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.' [Citation.]" (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759.)

The fact that the Rio Vista Project was completed before the inception of the Gerling policy is irrelevant. There was no evidence presented in connection with Golden Eagle's opposition to Gerling's motion for summary judgment that Cal-State believed that it was purchasing coverage for work that it had completed before the inception of the Gerling policy. And there is no evidence or argument that Cal-State was purchasing insurance coverage for potential defects in such completed work. Golden Eagle's contention otherwise amounts to nothing more than speculation.

Our conclusion is supported by the difference in premium paid by Cal-State to the two insurers. While Golden Eagle charged a premium of $238,235 for the Golden Eagle policy, Gerling only charged a premium of $152,841 to Cal-State. The reduced premium suggests that Cal-State was purchasing less insurance coverage from Gerling than it had from Golden Eagle.

II. *All Remaining Issues are Moot*

Having concluded that Gerling was entitled to judgment following its motion for summary judgment, all remaining issues raised by the parties are moot.

DISPOSITION

The April 6, 2006, order and January 25, 2008, judgment of the trial court are reversed. Gerling is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ